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No. 84-444

# In the Supreme Court of the United States

OCTOBER TERM, 1984

CHARLES J. CONNOR; THOMAS VITAL; FREDERICK STOWELL, JR.; PAUL DUBOIS; STEPHEN BOZA; ROBERT SAKWA; ANTONE FARIAS, JR.; RICHARD J. PERZENTZ; SCOTT FRYER; and MASSACHUSETTS LOBSTERMEN'S ASSOCIATION, INC.,

PETITIONERS,

*v.*

AEROVOX INCORPORATED and CORNELL-DUBILIER ELECTRIC CORPORATION,

RESPONDENTS.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

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I

## QUESTION PRESENTED

1. Did the United States Court of Appeals for the First Circuit correctly decide that a statute, held by this Court to have entirely preempted the federal common law of nuisance in the area of water pollution, preempted judicially-created nuisance claims arising under maritime law?

## PARTIES

Cornell-Dublier Electronics Corp. has no affiliates other than wholly-owned subsidiaries.

Aerovox, Inc. is a subsidiary of RTE Corporation. The only subsidiaries of RTE Corporation, other than wholly-owned subsidiaries, are CARTE Electric Ltd., a Canadian corporation and ARTEMA S.A., a French corporation. RTE Corporation also is a partial owner of RTE Zellweger Co., a Swiss partnership, Micro Faradios S.A. is the only subsidiary of Aerovox, Inc. that is not wholly-owned.

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## RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

The respondents Aerovox, Inc. and Cornell-Dubilier Electronics Corp. (the "respondents") respectfully request that the Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the First Circuit in this case. The Court of Appeals' opinion is reported at 730 F.2d 835 (1984).

## STATEMENT OF THE CASE

The petitioners are commercial lobstermen and a lobstermen's trade association who claim to have been harmed by contamination of New Bedford Harbor and neighboring waters by polychlorinated biphenyls ("PCBs"). More particularly, they allege that the closing of those waters to fishing, which they claim was the result of PCB discharges by the respondents, required them to fish in more distant and difficult waters and thereby decreased the profits and increased the risks associated with their business. These allegations, they contend, support a federal maritime tort claim sounding in nuisance, which they seek to maintain in this action.

The respondents moved to dismiss the action on the ground that federal statutes preempted the judicially-created claim the petitioners had put forward. The statutes relied upon were three comprehensive regulatory enactments: the Federal Water Pollution Control Act, 33 U.S.C. §1251 *et seq.* ("FWPCA"), the Maritime Protection, Research and Sanctuaries Act, 16 U.S.C. §1431 *et seq.* ("MPRSA") and the Toxic Substances Control Act, 15 U.S.C. §2601 *et seq.* ("TSCA"). The filing of the motion followed closely upon two decisions of this Court giving broad preemptive effect to FWPCA and MPRSA. The District Court for the District of Massachusetts, Skinner, J., granted the respondents' motion, holding that the all-encompassing regulatory program established by FWPCA and MPRSA preempted the petitioners' claim.

The Court of Appeals affirmed the dismissal on grounds of statutory preemption. The court observed that the elements of the maritime tort on which the petitioners based their claim were the same as a claim of common law nuisance, which the petitioners conceded to have been preempted. 730 F.2d at 838. Therefore, although assuming for purposes of analysis that prior decisions of this Court had not addressed maritime tort claims directly, the Court of Appeals found no basis in law or

logic to distinguish between maritime tort and other judicially-created federal nuisance claims with respect to the preemptive effect of FWPCA and MPRSA. 730 F.2d at 839-42.

## REASONS FOR DENYING THE WRIT

The decision of the Court of Appeals for the First Circuit dismissing the petitioners' claims on the grounds of preemption is compelled by the decisions of this Court and the reasons stated in *Milwaukee* v. *Illinois*, 451 U.S. 304 (1981) (*Milwaukee II*), and *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981). No subsequent decision of this Court gives reason to question the result below.

The decision below did not resolve novel or important questions of law; nor is it in conflict with any other decision of any federal court of appeals or state court of last resort. Compelled as it was by *Milwaukee II* and *Sea Clammers*, the Court of Appeals' decision did not resolve any important question not already settled by this Court. Its determination that FWPCA and MPRSA preempt maritime as well as other federal judicially-created law accords with the decision of the other court of appeals to have addressed the issue.

### I. Prior Decisions Of This Court Giving Broad Preemptive Effect To FWPCA And MPRSA Compelled The Decision Of The Court Of Appeals.

In *Sea Clammers*, the Court stated "that the federal common law of nuisance in the area of water pollution is entirely pre-empted" by comprehensive statutory regulation. 453 U.S. at 22. Accordingly, the Court dismissed tort claims brought by fishermen to recover damages for injury to their fishery from water pollution, claims identical in substance to those petitioners seek to press here. *See* 453 U.S. at 4-5, 22. The

plaintiffs in *Sea Clammers* sought to maintain their tort claims, based upon the same allegations, under both federal question and admiralty jurisdiction, and the Court of Appeals permitted them to do so. *National Sea Clammers Ass'n* v. *City of New York*, 616 F.2d 1222, 1233-36 (3rd Cir. 1980). In view of the limited grant of certiorari in *Sea Clammers*, however, it is not entirely clear whether the maritime tort claims were formally before the Court and, accordingly, among the "common-law claims" dismissed. 453 U.S. at 10-11, 22.

Regardless of the extent of the Court's formal adjudication in *Sea Clammers*, the reasons for its dismissal of common law claims apply with no less force to maritime tort claims than to other judicially-created claims. The basis of the dismissal in *Sea Clammers* was the Court's prior decision in *Milwaukee II*. Before the Court there was a claim brought by the State of Illinois under federal common law to abate a public nuisance allegedly arising from pollution of Lake Michigan by operators of municipal sewer facilities in Wisconsin. 451 U.S. at 308-10. The Court had noted the availability of such a remedy, in the absence of comprehensive statutory regulation of water pollution, in *Illinois* v. *Milwaukee*, 406 U.S. 91, 107 (1972) (*Milwaukee I*). Shortly after the decision in *Milwaukee I*, Congress enacted FWPCA, which provided for comprehensive regulation of discharges of pollutants, including fines and other penalties for violations. Having granted certiorari for the purpose of determining the effect of FWPCA on federal common law nuisance claims for water pollution, the Court determined in *Milwaukee II* that the Act preempted Illinois' claim. 451 U.S. at 307-08, 332.

The Court reached its finding of preemption in *Milwaukee II* on the basis of a conclusion that Congress had addressed the question raised by Illinois' common law claim. This standard for determining when federal statutes preempt judicially-created federal law was formulated in *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618 (1978), a decision holding that

the Death on the High Seas Act preempted application of a judicially-created measure of damages for wrongful death actions in admiralty. With specific reference to the *Higginbotham* decision, the Court in *Milwaukee II* stated as follows:

> Thus the question was whether the legislative scheme "spoke directly to a question"—in that case the question of damages—not whether Congress had affirmatively proscribed the use of federal common law.

451 U.S. at 315. Accordingly, because *Higginbotham* was an admiralty case, in determining the preemptive effect of FWPCA, the Court used the term "federal common law" to refer to maritime law created by federal judges. Moreover, the standard the Court used in *Milwaukee II* to determine the preemptive effect of FWPCA was a standard previously used to determine whether statutes preempted maritime law. The Court's holding that FWPCA and MPRSA entirely preempted the federal common law of nuisance compelled the decision, reached by the Court of Appeals, that those statutes preempted claims of maritime tort sounding in nuisance.

The position urged by the petitioners not only is in conflict with the analysis supporting *Milwaukee II* and *Sea Clammers*, but it also would render meaningless the result in *Sea Clammers*. There, the Court held nuisance claims by commercial fishermen for damage caused to their business by water pollution to have been preempted by FWPCA and MPRSA. The petitioners' position is that the Acts preempt only those nuisance claims brought under section 1331 federal question jurisdiction and not those brought under section 1333 admiralty jurisdiction. As noted by the Court of Appeals, the reach of admiralty jurisdiction would extend to virtually any nuisance claim by a fisherman for damage to his business as a result of water pollution. *See Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982); *Conner v. Aerovox, Inc.*, 730 F.2d 835, 839 (1st Cir. 1984). Accordingly, acceptance of

the petitioners' position would permit plaintiffs to maintain the very claims held by the Court in *Sea Clammers* to have been preempted and all like claims merely by reciting section 1333 as a jurisdictional basis. In short, if the petitioners' position were not rejected, statutes determined by the Court to have broad preemptive effect would have essentially no preemptive effect.

No decision by the Court after *Sea Clammers* and *Milwaukee II* gives reason to question the decision of the Court of Appeals. In particular, the petitioners misplace their reliance on *Silkwood* v. *Kerr-McGee Corp.*, 104 S.Ct. 615 (1984). There, the Court determined that the Atomic Energy Act did not preempt state law claims to recover punitive damages for radiation injuries on the grounds that the state law damage remedy was neither in conflict with federal law nor calculated to frustrate the objectives of federal law. 104 S.Ct. at 626. As the Court stated in *Milwaukee II*, precedents regarding federal preemption of state law are not instructive when preemption of judicially-created federal law by federal statutory law is at issue. 451 U.S. at 316. In the latter circumstances, where principles of federalism requiring deference to state law are inapplicable, the proper inquiry is solely whether Congress has addressed the matters at issue with a comprehensive regulatory program. 451 U.S. at 317. Because Congress has done so in the area of water pollution, the petitioners' claims are preempted.

## II. The Decision Below Resolves No Important Question Of Law Required To Be Settled By This Court And Is In Accord With The Other Decision Addressing The Same Issue Of Law.

The single issue decided by the Court of Appeals is not of such importance that it need be settled by this Court. That issue is whether statutes that entirely preempt the federal common law of nuisance in a particular area preempt maritime as

well as other judicially-created federal law. The Court already has addressed the question of the preemptive effect of those statutes twice. The analyses of that question in *Milwaukee II* and *Sea Clammers*, even if interpreted not to adjudicate the precise issue presented here, certainly furnish ample guidance to the lower federal courts.

In fact, the question presented by the petition has not given rise to conflict among the federal courts. One other court has addressed the question. It reached the same result as the court below. *See In re Oswego Barge Corp.*, 664 F.2d 327 (2nd Cir. 1981).

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari does not present any question warranting the Court's review, and the Court should deny the petition.

Respectfully submitted,

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